

TAB E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

ORIGINAL

IN RE:

1

) Chapter 11

W.R. GRACE & CO., et al.,) No. 01-01139 (JFK)

3

Debtors.

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VOLUME 1 - Pages 1 - 248

23 | REPORTED BY: Margaret M. Kruse, CSR, RPR

24 | LICENSE NO: 084-003036

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1 misread Armstrong independently, partly because
2 I was finding Armstrong a hard case to read.
3 There seemed to be a logical discontinuance
4 within it.

5 Q. But your opinion and Mr. Mew's opinion,
6 which both were that the cause of action accrued
7 or arose at the date of installation, was
8 entirely consistent with Judge Drost in Privest;
9 was it not?

10 A. It was certainly consistent with Judge
11 Drost in Privest. Yes, it still is.

12 Q. And that's the only case in British
13 Columbia or anywhere in Canada, to your
14 knowledge, that addresses this kind of Winnipeg
15 Condo case; is that correct?

16 A. No.

17 Q. Is there another asbestos buildings case
18 in Canada?

19 A. No.

20 Q. It's the only case that addresses this
21 issue in the asbestos and building context,
22 correct?

23 A. With that degree of specificity in the
24 asbestos context, that is quite true. And that

1 is understandably why both Mr. Mew and Professor
2 Klar laid such stress on the Privest case.

3 I've got to tell you as well that if I
4 were Mr. Justice Drost, confronted with the
5 evidence with which he was confronted, as it was
6 presented to him in that case, I probably would
7 have reached the same conclusion, though not on
8 this point relating to when the cause of action
9 arose.

10 Q. His determination of when the cause of
11 action arose was a legal determination; was it
12 not?

13 A. It was indeed. It was very much that
14 was an issue of law.

15 Q. Can you tell me what your opinion is, if
16 it's not installation, as to when the cause of
17 action arises for purpose of the normal
18 limitations period in British Columbia in a case
19 of this nature?

20 A. It is difficult to do this with
21 confidence without having really satisfactory
22 and well-argued case material from that province
23 to have.

24 But if I'm permitted to ad lib on this,

1 a foot thick falling nine stories from a
2 high-rise building is dangerous on any
3 definition of that term. And so the court did
4 not feel it necessary to define what a real and
5 substantial danger is. But I do assert this,
6 that until there is a showing by a claimant or
7 until a plaintiff can show that a real and
8 substantial danger resulted from the alleged
9 breach of duty of a defendant, he cannot assert
10 a cause of action. A cause of action has not
11 arisen.

12 Q. In this type of case, what is the real
13 and substantial danger that would trigger the
14 statute; do you have an opinion?

15 A. I have an opinion, but it leads to
16 circularity as so much does in this area. I
17 think there would be a real and substantial
18 danger where a building owner of prudence and
19 common sense would say to himself we're going to
20 have problems of safety here. It is time we put
21 it right. It is time we put an abatement
22 program in place.

23 Now, with regard to asbestos, I'm not
24 going to express an opinion for the very good

1 and sufficient reason that I don't know anything
2 about asbestos.

3 I am perfectly prepared to believe,
4 however, and I believe Mr. Fairey has told me
5 this from time to time, that a building with
6 Mono-Kote 3 in it isn't immediately, in any
7 realistic sense, dangerous.

8 It may become dangerous under certain
9 circumstances. It may sit dormant doing its
10 job. It may, in fact, be essentially harmless
11 and entirely satisfactory until the date comes,
12 as it may never come, when that material is
13 disturbed and when its friable character may
14 result, so I'm told, in loose asbestos being
15 released into the atmosphere.

16 But what do I know of these matters?
17 That's not a legal issue. I shouldn't
18 pontificate upon it. So I can't give you a
19 fact-specific asbestos-related answer to your
20 question, A, because the cases don't give me
21 much guidance -- I'm always forced back on
22 Winnipeg Condo itself -- and, B, because I'm not
23 qualified to talk about asbestos injury. I lack
24 your unenviable expertise in that area.

1 But I thought I'd mention it in passing just for
2 the sake of completeness.

3 So I've got two legal mistakes on
4 Mr. Justice Drost's part at the moment, one
5 that's established by authority in the Armstrong
6 case and the other, which is a mere musing which
7 you can take or leave on my part, with regard to
8 agency to know.

9 Q. I've been taking or leaving a lot of
10 this. So give me number three.

11 A. Number three is the question of cause.
12 We come back to this again and again, when the
13 cause of action arose, when relevant damage was
14 done.

15 And Mr. Justice Drost, as we know, did
16 undoubtedly say, unequivocally, that for
17 purposes of this kind of action, in his opinion,
18 damage is done as soon as the Monokote is
19 installed in the building.

20 He did say that. I respectfully
21 disagree with him. And I've already said a good
22 deal about this. I will be saying a good deal
23 more in writing. Obviously, if at some stage
24 you wish to pursue that, I'll be happy to do my

1 however, in other what we call common law torts,
2 from the old action of trespass, which is still
3 very much alive, nuisance, some aspects of
4 strict liability. That's about it. Time is
5 always limited and we have to pick and choose
6 our topics.

7 I don't think there's a tort course in
8 North America which covers everything from A to
9 Zed, and it would have to skate very thinly if
10 it did.

11 But very largely we deal with
12 negligence, and particularly with the more
13 difficult areas with negligence, such as that
14 with which we are currently concerned today.

15 Economic loss has taken up a
16 disproportionate amount of time, of course, in
17 recent years because it's so difficult and so
18 important and because leading cases keep coming
19 along.

20 Q. And you were educated in England; is
21 that correct?

22 A. Yes.

23 Q. Were you ever called to the bar in
24 England?

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1 A. No, I never was. I was on the cusp of
2 doing so when I got a job offer here, and it
3 never came to be.

4 The process for qualifications for the
5 bar in England is exceedingly time-consuming and
6 peculiar, and I just had to make a decision
7 where my career was going to be. So I was never
8 called to the bar, though I was and I suppose
9 remain a member of Gray's Inn.

10 Q. Is it fair to say you've spent your
11 entire professional career as a law professor?

12 A. Yes.

13 Q. And would it be fair to say
14 concentrating in the area of tort law?

15 A. A predominance of tort law, with a
16 respectable degree of attention to other issues.

17 I have, for instance, been engaged as an
18 expert witness, my second engagement as such, in
19 a very major Manitoba controversy at the moment
20 concerning the law of easements and a very large
21 agreement between the government and certain
22 native communities.

23 So it isn't entirely tort law, but I
24 think it fair to say that that has been my

1 predominant concern and preoccupation over the
2 last 30-odd years.

3 Q. And within tort law, would it be fair to
4 say that your primary area of expertise is in
5 the medical setting?

6 A. I don't think really so. I try to be
7 more of a generalist than that, though I am
8 extremely interested in the medical setting.

9 And I have, of course, participated in
10 this book, now in its third edition, in which I
11 provided really the tort law components, the
12 difficult bioethical issues which also feature
13 in the book, although written by others.

14 Q. Have you ever published a textbook or
15 treatise or a monograph on tort law as a whole
16 or on products liability?

17 A. No, I have not.

18 Q. And you're not a scholar of American
19 law; is that correct?

20 A. Oh, I would certainly say not.

21 Q. Is it fair to say you don't hold
22 yourself out as an expert on American law?

23 A. I do not.

24 Q. And you would not be able, I take it, to

1 give an opinion on any aspect of American law,
2 would that be correct, expert opinion?

3 A. I'm trying to be fair to myself here,
4 and I would say that is a perfectly fair
5 opinion. It would be utterly presumptuous.

6 Q. You're a commissioner of the Manitoba
7 Law Reform Commission?

8 A. I am, since 1984.

9 Q. What is your role as a commissioner?

10 A. It's a good question, actually.

11 The Manitoba Law Reform Commission is a
12 body financed, in part, by the Manitoba
13 government, appointed by the government of
14 Manitoba, the provincial government.

15 Actually, it's the Governor General in
16 Consulate of the provincial cabinet who appoints
17 and reappoints members.

18 It's charged with the job of constantly
19 reviewing and revising all aspects of provincial
20 law in Manitoba, with an eye to modernizing the
21 law, erasing anachronisms and useless survivals
22 from another age, keeping the law abreast and,
23 if possible, sometimes ahead of the front lines
24 of development in the law across North America.

1 no, I've never written a textbook or major
2 article on these issues.

3 I must say, quite freely, that very few
4 people have. You're lucky in securing the
5 services of Mr. Mew, who has written what is now
6 the only Canadian textbook on the subject. And
7 I don't think people would be easy to find
8 anywhere else in Canada who have spent so much
9 of their time on the limitation periods, because
10 limitation periods are not the subject of any
11 nominate course of any law school in Canada, nor
12 does anyone in Canada that I'm aware of hang up
13 their shingle as specializing in limitation
14 periods. I think that would be a bad business
15 move.

16 So expertise in that area -- my claim to
17 expertise in this area would be a very difficult
18 one and it would reflect that I have been
19 counting limitation periods regularly and often,
20 consistently from all jurisdictions of Canada
21 for more than 30 years. I have had occasion to
22 think long and hard about what they involve.

23 One exposure to limitation periods, of
24 course, which is constant and unremitting, is

1 are now rather grievously out of date.

2 Q. If they do not touch at all on
3 limitations, I'm not interested. If they touch
4 in whole or in part on limitations, I'm
5 interested in seeing these because I'd like to
6 see what it is that you've put out there.

7 In our courts, ordinarily when you do an
8 expert report you need to provide a list of
9 publications in the relevant area for five or
10 ten years or whatever. I can't remember the
11 period, but it's a long period. I don't have
12 those, and I would like to see what you have out
13 there by way of presentations, papers or what
14 have you, but only if they touch on limitations
15 law.

16 A. In fairness to you both, if Mr. Fairey
17 has no objections.

18 Q. I'm requesting them of him.

19 Have you ever taught civil procedure?

20 A. No.

21 Q. Is it often the case where limitation
22 periods are taught in Canadian law schools in
23 civil procedure courses?

24 A. I believe that that is the case.

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1 Q. Are those courses usually taught by
2 practitioners as opposed to professors?

3 A. In our law school, that is invariably
4 the case. They're taught by sessionals,
5 practitioners of many years standing who do
6 provide a very important component in their
7 teaching body, yes.

8 Q. And you've never, prior to this matter,
9 offered expert testimony on Canadian limitations
10 periods, correct?

11 A. That is true.

12 Q. And prior to this engagement, you have
13 never written an expert report on Canadian
14 limitations; is that true?

15 A. I never have.

16 Q. Do you consider yourself an expert in
17 the Canadian law of limitation periods?

18 A. I must phrase my answer to that
19 carefully.

20 I don't think that there is anyone in
21 Canada who could claim to be an expert in
22 limitation periods or an expert in limitation
23 periods to the same degree, for example, as
24 Professor Klar would claim to be an expert in

1 enact legislation accommodating modern class
2 action proceedings in their court. That was
3 duly passed into law by the government of
4 Manitoba in, I believe, 2002. It is that
5 recent.

6 So no, I do not profess detailed
7 knowledge of this area. It's just that the
8 mention of class actions in this context did
9 flag a concern for me and I did my poor best to
10 reflect that in my opinion. But I'm not going
11 to dogmatize about it because I am neither
12 qualified nor confident enough to do so.

13 Q. The Manitoba Law Reform Commission
14 report, was that the one in January of 1999?

15 A. I think that would be right.

16 Q. And you didn't author that; is that
17 correct?

18 A. I did not author it, no. It was
19 authored by a colleague, Professor Karen Busby,
20 B-U-S-B-Y.

21 Q. So based on what you had said earlier,
22 you don't consider yourself an expert in class
23 action tolling; is that correct?

24 A. No, I do not.

1 MR. FAIREY: I'm sorry. I think your
2 question --

3 BY MR. CAMERON:

4 Q. You indicated earlier you do not
5 consider yourself an expert on class action
6 tolling; is that correct?

7 A. On class action tolling?

8 Q. Yes.

9 A. No, I do not consider myself an expert
10 on class action tolling.

11 Q. Is it fair to say you're not offering an
12 opinion in this report on class action tolling?

13 A. It is fair to say that I am raising a
14 question which I think may have been disregarded
15 by other expert witnesses.

16 In the interest of alerting the court,
17 which I think is one of my functions in this
18 regard, but if expertise be needed in order to
19 raise a flag or give a head's up to interested
20 parties, then I must decline to claim any such
21 expertise.

22 I merely thought when I saw this issue
23 that it needed to be addressed, because without
24 addressing that issue, one is deprived of any

1 leaving it to others better qualified than I to
2 resolve that divergence of hypotheses.

3 Q. I think you may have addressed these.
4 You have not been called to the bar in the
5 Province of Manitoba; is that correct?

6 A. No.

7 Q. And you've not been called to the bar in
8 any other Canadian provinces?

9 A. No.

10 Q. And you don't have any practical
11 experience with either Canadian limitations
12 periods or class action tolling, correct, as a
13 practicing lawyer?

14 A. As a practicing lawyer?

15 Q. Yes.

16 A. No.

17 Q. This is now just your second expert
18 engagement; is that correct?

19 A. Yes.

20 Q. And how are you charging for your work
21 here?

22 A. No guidance was given to me as to what I
23 should charge. So taking my queue from the
24 opinions of Mr. Mew and Mr. Klar, I suggested an

1 found a number of startling things.

2 Q. In fact, you found everybody was wrong.

3 You found Drost was wrong, too, right?

4 A. I still believe Drost was wrong on this,
5 but, of course, that matter was never
6 re-examined in the court of appeal. For the
7 limitations period, they should have never went
8 to the court of appeal.

9 Q. But that is what Drost found, correct?

10 A. Undoubtedly.

11 Q. And you think he is wrong?

12 A. I think he's wrong. We don't say wrong
13 very much in Canada. We tend to say his
14 Lordship was poorly assisted by counsel. It's
15 more diplomatic.

16 Q. You said wrong four or five times in the
17 deposition, so I thought I'd follow up with
18 that.

19 A. Fair enough.

20 I think he's wrong, but certainly there
21 is the authority of Mr. Justice Drost, and
22 arguably that of Madam Justice Loo as well,
23 which supports this proposition.

24 Q. Privest is the only case, is it not,

1 that involves asbestos-containing materials in a
2 building where the claim is for pure economic
3 loss; is that right?

4 A. Yes, absolutely right.

5 So Mr. Justice Drost's opinion
6 represents an impediment to my view. Since he
7 doesn't cite any authority for it but merely
8 asserts it, I'm somewhat embarrassed in tracking
9 the course of his thoughts. So I just have to
10 acknowledge that Mr. Justice Drost stands
11 against me on this and I acknowledge it.

12 What worries me more though -- well, it
13 doesn't worry me. What has caused me this
14 change of view and is now causing us so much
15 inconvenience, for which I apologize, is that
16 when I look at the Armstrong case, I find a
17 number of very curious things.

18 First of all, it isn't a case about the
19 incorporation of defective materials in
20 buildings at all. It is not a case about
21 defective input in buildings. It isn't, in
22 other words, a Winnipeg Condo-type case at all.
23 It is a case about negligent building
24 inspectors.

1 and tort might theoretically be brought.

2 Q. There would have to be privity, correct?

3 A. There would have to be privity always
4 for a contract action.

5 Q. If you look at page 4 of your report,
6 tell me if I'm reading this correctly, where you
7 say, "All the building owners in this litigation
8 would seem as having prospective remedies in
9 tort and only in tort since there would seem to
10 be no privity of contract between them and the
11 Grace Company. And in Canada, as elsewhere in
12 the commonwealth, the warranty concept does not
13 transcend the bounds of contractual privity as
14 has happened so generally in the United States."

15 Did I read that accurately?

16 A. You read it accurately, and I stand by
17 that.

18 Q. And you stand by that?

19 A. Yes.

20 Q. Under those circumstances, there would
21 be no breach of warranty claim; is that correct?

22 A. I believe that is correct.

23 Q. Is it your opinion that all of the
24 claims in this litigation would be negligence

1 claims for pure economic loss?

2 A. Yes.

3 Q. They would specifically be negligence
4 claims for pure economic loss arising from the
5 construction of buildings with defective
6 components, correct?

7 A. Yes. And that is intended as a
8 descriptor of the precise technical category
9 into which these claims fall. It isn't merely a
10 general observation. I'm attaching a label to
11 these claims here.

12 If I might qualify myself just for the
13 sake of complete accuracy, there have been a few
14 cases in Manitoba involving shoddy buildings in
15 which the court of appeal has flirted with the
16 possibility of advancing other headings of
17 economic loss negligence claims, such as
18 negligent misrepresentation and the negligent
19 provision of services.

20 My own view, like that of Professor
21 Klar, is that that is an unprofitable avenue of
22 inquiry, and these should be treated as Winnipeg
23 Condo-type claims, shoddy or defective
24 building-type claims, and belong to that

1 category and, for the best part, argued within
2 that category.

3 Q. And that's your opinion as you sit here
4 today?

5 A. That's my opinion.

6 Q. And the controlling case, as you
7 recognize, is the 1995 Supreme Court of Canada
8 case of Winnipeg Condominium, correct?

9 A. Yes.

10 Q. Up to this point, these opinions are
11 consistent with the opinions of Professor Klar
12 and Mr. Mew on these issues, correct?

13 A. Absolutely.

14 Q. Because they also categorize the claims
15 at issue in this proceeding as negligence claims
16 for pure economic loss?

17 A. I agree entirely with that.

18 Q. Now, prior to Winnipeg Condominium,
19 these claims for pure economic loss were not
20 actionable, were they?

21 A. This is a very good question. Can I
22 spend a couple of minutes on that?

23 Q. Why not.

24 A. You know I'm going to.

1 and undisturbable finding on the evidence
2 presented in that case, as it was presented.

3 And to that extent, it is entitled to
4 our respect and it will be treated with respect
5 by subsequent courts across Canada. But it will
6 not necessarily be followed because it turns so
7 much on the matrix of evidence which was
8 presented in that case, and perhaps, to some
9 degree, upon the intemperate and not all
10 together optimal manner in which that evidence
11 was presented by the plaintiffs in that case.

12 Q. Done?

13 A. Yes.

14 Q. It's the only such case on liability for
15 asbestos-containing products that's even reached
16 the trial stage; is that true?

17 A. That is true.

18 Q. Do you agree that Judge Drost in Privist
19 carefully and skillfully evaluated the evidence
20 that was present?

21 A. Very skillfully and in a very
22 workmanlike and professional way.

23 Q. And you agree that the court's judgment
24 is lengthy, careful and elaborate in the essence

1 that it deals with a multiplicity of discrete
2 issues and difficult questions of law; is that
3 correct?

4 A. Yes.

5 Q. And you are aware that Privist was one
6 of the longest trials in the history of British
7 Columbia?

8 A. I'm not sure about that. I haven't
9 studied the litigation practices of British
10 Columbia, except to say that it is an extremely
11 litigious province and I'm sure has generated
12 many, many long, long judgments.

13 It is certainly an elaborate and lengthy
14 and meticulous judgment by any standard.

15 Q. Have you reviewed the entirety of the
16 Privist decision?

17 A. I have read the entire thing with
18 varying degrees of interest at different phases.

19 There were, for instance, sections to
20 which I must confess I perhaps paid less respect
21 than I should have done, for instance, that
22 relating to the use of supposed works of
23 authority in evidence, which said nothing but
24 which was, I think, helpful and instructive for

1 with this qualification, that the courts there,
2 as I understand here, do have the power under
3 rules of court in various jurisdictions, to
4 grant summary judgment or exclude a claim on the
5 basis it discloses no reasonable and probable
6 cause of action. That, I think, is familiar to
7 all common law jurisdictions, but it isn't
8 simply a matter of judicial fiat.

9 Even there, these jurisdictions, which
10 will be very sparingly exercised, will at least
11 involve a judicial process in which the judge
12 gives reasons why he thinks the particular claim
13 is, in realistic terms, hopeless of success.

14 Q. With respect to your statement, can you
15 tell me on what practical experience you base
16 that conclusion?

17 A. You know I do not practice. I merely
18 watch what happens in the courts.

19 As all academics do, we watch what the
20 practitioners and the judges do and we try to
21 document and observe their courses of behavior
22 and make generalizations from them. So do the
23 textbooks on civil procedure which deal with
24 such things as applications for summary judgment

6 Q. And you agree with Mr. Mew's assessment
7 that the governing law would be the law where
8 the property is located, correct?

9 A. I think that is unarguable. I'm not, as
10 I remarked before, any kind of authority on
11 conflict of laws, but I did note and indeed have
12 at one time given a lecture on Tolofsen and
13 Jensen.

14 I think that that proposition is, for
15 the time being at least, beyond argument across
16 Canada.

17 Q. And you're not offering any opinion on
18 conflicts of law; is that correct?

19 A. No, I'm certainly not, except on that
20 one point where Mr. Justice LaForest expressed
21 himself very clearly and emphatically.

22 || Q. What is that?

23 A. Lex loci delicti. He said in tort
24 claims, the lex loci delicti, the place where

1 the discoverability principle?

2 MR. FAIREY: Object to the form.

3 THE WITNESS: I would take the view that
4 a person or litigant who wishes to rely upon a
5 limitations defense has the burden of persuading
6 the court that he is entitled to the shelter of
7 the Limitations Act. I don't assert that as a
8 matter of dogmatism.

9 I would like to have the opportunity of
10 revisiting that question when I've given it
11 further consideration. But my view would be on
12 ordinary principles that a litigant who seeks
13 the benefit of the statutory defense has the
14 overall burden of establishing his entitlement
15 to it.

16 That does not mean that on questions of
17 evidence the burden may not shift, the so-called
18 tactical burden of proof, with the ebb and flow
19 of evidence in the case. So I am unwilling to
20 dogmatize on that question.

21 Q. Do you agree that the court in Privest
22 held that the limitations period began to run
23 from the date of installation?

24 A. Yes.

1 Q. And that was a legal determination made
2 by the court, correct?

3 A. It was.

4 Q. And you're not aware of any other case
5 where a Canadian court has adopted a different
6 trigger for a limitations period for an asbestos
7 property damage claim, are you?

8 A. For asbestos property damage?

9 Q. Correct.

10 A. No, I'm aware of no other case involving
11 that issue.

12 Q. I think that, at least in the report I
13 was provided earlier, you had two primary
14 disagreements with Mr. Mew, one his application
15 of a date of installation trigger --

16 A. Yes.

17 Q. -- for the limitations period?

18 And, two, his conclusion that for
19 purposes of determining when the lawsuit was
20 commenced, so to determine whether the
21 limitations period has run, the claimants
22 commenced their claim on April 2, 2001, the date
23 of the bankruptcy?

24 A. That's rather a long question, but I

1 my purview.

2 Q. Did you review any of the hearing
3 transcripts?

4 A. No, indeed.

5 Q. Is it fair to say you're not offering an
6 opinion on the effect of the South Carolina
7 action?

8 A. Absolutely fair and I think a very
9 prudent decision on my part.

10 Q. What you do is your report seems to --
11 if I understand correctly, you offer basically
12 two opinions relating to the Canadian limitation
13 periods. One opinion, if the Canadian claimants
14 are members of the Anderson Memorial class, and
15 that class action tolls the applicable Canadian
16 limitations periods and in a different opinion
17 if it does not; is that correct?

18 A. It is, I thought, the most helpful way
19 to proceed.

20 Q. You believe this issue to be one of
21 critical, perhaps dispositive, importance?

22 A. I can manage circumstances where it
23 might be, yes, because it will certainly effect
24 sheer calculation as to whether the available

1 Anderson Memorial case tolls the applicable
2 Canadian limitation periods?

3 A. No. That would depend in large measure
4 on the North Carolina statute which I have not
5 seen. I think it is an argument that counsel
6 would do well to examine. That is all I can say
7 on that.

8 Q. Is it also dependent on the class
9 proceeding acts in Canada?

10 A. That is a very good question.

11 It might be regarded as a question of
12 conflict of laws. Again, I would think myself
13 that that might depend on the jurisprudence of
14 the South Carolina courts.

15 But I am not, as I say, expert in the
16 minutia of class litigation, nor have I ever
17 professed to be so. I appreciate the force of
18 your argument, I know where it is going, but I
19 cannot assist you with an answer with any degree
20 of confidence.

21 I have not, I confess, looked at this
22 question, nor do I think you will find very
23 clear guidance from the available Canadian
24 textbooks on that question.

1 Q. At page 19 of your report you state,
2 "All existing Canadian and other Class
3 Proceedings Act of which I am aware expressly
4 provide for the tolling at that point at which
5 class proceedings are commenced on any
6 limitation period then running against any
7 putative or potential class member."

8 A. Yes.

9 Q. Can you tell me what class proceeding
10 you're referencing there?

11 A. I'm looking at the Manitoba one. I did
12 look briefly at one or two others. I didn't
13 attempt, because I was not going to profess any
14 depth of expertise on this issue. I did look at
15 one or two other class proceeding acts, not
16 including the Quebec one.

17 I am not sure that I can recollect now
18 what they were. But I did, and I hope this is
19 not regarded as dirty pool or foul play. I did
20 consult a colleague, Professor Busby, who is in
21 many ways the authoress of the Manitoba law of
22 home commission report, and thence, I suppose
23 indirectly, the authoress of our statute, and
24 asked her what her response was to that

1 question. And it is in line with what I've
2 recorded there.

3 I do not want to convey the impression
4 that I've exhaustively scoured the statutes of
5 the common law provinces for an answer to that
6 question because it would be beyond my province
7 and beyond my expertise and would indeed be
8 calculated intentionally to mislead.

9 Q. You've done no analysis of any of those
10 class proceedings?

11 A. No, indeed, I haven't.

12 Q. At page 32 of your report you state,
13 "First, the institution of a class must (as a
14 principle of seemingly universal application) be
15 taken to 'toll' the effluxion" -- I don't know
16 what that word is.

17 A. Effluxion.

18 Where are we, on page 32?

19 Q. Page 32.

20 A. How far down are we? Oh, the effluxion,
21 the flowing away. It's a favorite word of
22 Canadian --

23 Q. (Continuing) -- "effluxion of any
24 limitation period, affecting any class member,

1 at the moment the class action is or commenced."

2 Correct?

3 A. Yes. I did write that.

4 Q. Can you tell me what the basis for that
5 statement is?

6 A. Very fragile.

7 It is just my understanding from talking
8 with people like Professor Busby, and I have
9 never heard it contradicted. I have, as I say,
10 perused the case books.

11 I repeat, I do not set myself up as an
12 expert on Canadian class litigation. Therefore,
13 you can take what I say on these questions with
14 appropriate weight, which may not be much.

15 I merely thought it necessary, not only
16 in respect of this but in respect of another
17 issue, to raise the issue and put it in
18 contention.

19 Perhaps I have an inflated view of the
20 importance of these depositions. I thought the
21 issue should be raised just to put it on the
22 table and to show that I knew it was there,
23 because Professor Mew had, to my mind,
24 overlooked it. Perhaps he had very good reasons

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1 identified in your report as it being a
2 potential issue; is that correct?

3 A. Yes, I think that is true.

4 Q. And you've made no analysis of that
5 issue and don't intend to provide any expert
6 opinion on that issue?

7 A. That is an entirely reasonable inference
8 from what I've said.

9 Q. So you haven't examined the language in
10 the legislative history of the class proceeding
11 act; is that correct?

12 A. Of which jurisdiction?

13 Q. Of the Canadian provinces.

14 A. Of all of them, no. Only that of
15 Manitoba.

16 Q. Had you read the Manitoba class
17 proceeding act prior to being asked to write
18 this report?

19 A. Yes, I had. I had to because the law
20 reform commission had a good deal of input on
21 its content, but it had been sometime before.

22 Q. Do you have any familiarity with the
23 case law in the class action area?

24 A. Only on a casual basis with regard to

1 things I looked up in the available rather
2 meager Canadian text on this issue as part of
3 this interesting exercise.

4 But then, as I say, I am professing no
5 expertise on class litigation whatever. And I
6 don't think there would be much point in my
7 pretending to be adept in all the minutia of
8 class litigation or even in Canada where the
9 field is relatively new. It might for that
10 reason relatively quickly mastered.

11 I have not done so and I do not propose
12 to do so or indeed to offer any other input on
13 this issue. I have stated my concern. I think
14 it needed to be stated and I stand by that.

15 Having stated it, and provoked it may
16 be, some reaction from Mr. Mew, I am happy to
17 leave the resolution of all issues concerning
18 class proceedings to persons other than myself.

19 Q. Do you know when each of the Canadian
20 provincial class action statutes were enacted?

21 A. Mostly very recently.

22 The only exception, as I say, I did not
23 intend to answer multitudinous questions about
24 class actions, because I do not profess

1 expertise in them. But I do know that Quebec
2 got off to a very early start back in the 1960s,
3 certainly many years ahead of the others.

4 Q. Can you look at Exhibit No. 7, the Mew
5 affidavit?

6 A. The Mew affidavit, No. 7. Yes, here I
7 have it.

8 Q. In paragraph 4 in the footnote on the
9 bottom of page 2.

10 A. Yes. Footnote 4, yes.

11 Q. Do you have any reason to dispute the
12 dates that Mr. Mew has there for when these
13 class proceeding acts came into play?

14 A. They strike me as approximately correct.
15 I have not verified that, so my opinion on that
16 is of no value. I think they sound extremely
17 plausible. They also sound extremely recent.

18 Q. Do you know whether the terms of the
19 class action proceeding acts apply to actions,
20 class actions that were started before the
21 statutes were enacted?

22 A. I cannot recollect that. As I say, I do
23 not profess expertise in this area. And I must
24 confess I'm not entirely sure that I can

1 usefully answer questions along these lines. I
2 have indicated my nonexpertise in class actions
3 and I'm content that it should remain so.

4 (Whereupon, Irvine Deposition
5 Exhibit No. 8 was marked for
6 identification.)

7 BY MR. CAMERON:

8 Q. I'm going to show you what's been marked
9 as Exhibit No. 8. Is this the Class Proceedings
10 Act for Manitoba?

11 A. I assume it is, yes.

12 Q. And this is the one that you say you did
13 review, correct?

14 A. I looked at it.

15 Q. If you turn back to page 22 of 22.

16 A. Uh-huh.

17 Q. Which is, I believe, the last page.

18 A. 22.

19 Q. 22 of 22, last page.

20 A. Yes.

21 Q. Do you see Section 41 there?

22 A. Uh-huh.

23 Q. "This act does not apply to. . . a
24 representative proceeding commenced before this

1 Act comes into force." Is that correct?

2 A. Section 41 or 42?

3 Q. Section 41.

4 A. This is quite correct. It does say
5 that.

6 Q. And this class proceeding act came into
7 force on January 1, 2003, correct?

8 A. Yes, I believe that is correct.

9 Q. And the Anderson Memorial class action
10 was filed when, in 1992; is that correct?

11 A. So I'm told.

12 Q. You don't address this issue in your
13 report, do you?

14 A. Indeed, I do not.

15 Q. You didn't compare the effective dates
16 in the class proceeding acts and compare them to
17 the date the Anderson Memorial class action was
18 filed, did you?

19 A. No. I can see that this raises a most
20 interesting issue which I cannot help you in
21 resolving.

22 Q. Okay. So you didn't investigate whether
23 the class proceeding act applies retroactively,
24 did you?

1 A. No, I didn't.

2 To tell you the truth, if I would have
3 done that I would have felt I was trespassing
4 far beyond my professed expertise in relation to
5 this.

6 I undertook to give opinions generally
7 about the tort liability, which I believe I've
8 done, and generally about limitation periods,
9 and I believe I've done that.

10 It's just that inevitably, the law being
11 a seamless web, it throws up tangential issues
12 which may take one into areas which are not
13 encompassed by as much expertise. And this is
14 an instance where I'm candidly telling you I'm
15 getting out of my depth, I'm getting out of my
16 own territory, I'm not comfortable and I'm
17 unlikely to be able to help you.

18 Q. Do you have any basis to dispute
19 Mr. Mew's conclusion that the class proceeding
20 acts would not apply to class actions filed
21 before their enactment?

22 A. I have no bases on which to contest that
23 nor any basis on which to support it.

24 I haven't even read Mr. Mew's opinion.

1 And even if I did, my limited knowledge of class
2 proceedings would not enable me to give a
3 meaningful critique of it. Nor have I any
4 evidence as to what is the prevailing
5 credibility or weight of Mr. Mew's expertise in
6 this area.

7 I make that not as a negative statement
8 or a criticism of Mr. Mew. I'm just saying
9 frankly I do not know.

10 Q. Do you know whether the Class
11 Proceedings Act in each of the provinces applies
12 only to proceedings commenced in the appropriate
13 court in that province?

14 A. Whether which? I'm sorry.

15 Q. Do you know whether the Class
16 Proceedings Acts in each of these provinces
17 applies only to proceedings commenced in the
18 appropriate court in that particular province?

19 A. I would think that was -- if I
20 understand the question correctly, I would
21 imagine that is so.

22 But, again, I must protest I do not set
23 myself up as an expert on Canadian or any other
24 class proceedings. I would have thought that

1 opinion on limitations period?

2 A. I thought it was important that I raise
3 the issue but leave its determination to persons
4 presumptively more learned in the area than I am
5 and that I contentedly do now.

6 I don't see how I could have avoided,
7 however, raising the issue of class proceedings,
8 because without knowing for sure when the
9 relevant date is for the making of limitations
10 calculations, I couldn't give a single
11 undifferentiated answer to that question while
12 this issue -- and I perceive it to be an issue
13 -- remains unresolved. Whether it is
14 unresolved, I know not.

15 Q. Would you agree with me that if each of
16 the Class Proceedings Acts at issue were enacted
17 and effective after the filing of the Anderson
18 Memorial class action, and that each of those
19 proceedings acts provides that they do apply to
20 actions filed before the effective date of those
21 proceedings acts, would it be fair to say that
22 the one prong of your opinion is no longer
23 relevant?

24 MR. FAIREY: Object to the form.

1 for determining whether or not the limitations
2 periods have run is the April 2, 2001,
3 bankruptcy filing date?

4 A. I don't think it could be any other
5 date.

6 Q. Let me turn to the ultimate limitation
7 period, that part of your opinion.

8 Do I understand correctly from your
9 opinion that the ultimate limitations periods
10 are specifically designed to cut short
11 limitation periods after the lapse of a certain
12 period of time, even though the discoverability
13 concept might otherwise allow the claimant more
14 time?

15 A. Yes.

16 Q. Stated differently, as you said in your
17 report, when determining when the ultimate
18 limitation periods begin to run, no reliance can
19 be accorded to what the claimant knew or did not
20 know or ought or ought not to have discovered;
21 is that correct?

22 A. I believe that that is true. I don't
23 think it is beyond argument, but that is my
24 opinion and belief.

1 A. Yes, and it was wrong.

2 Q. Armstrong's not in there, is it?

3 A. No, it isn't.

4 Q. Did you read the authority in footnote
5 67 before issuing this report?

6 A. I read all these cases and I'm afraid
7 that I simply confused myself at that point.
8 I've got it sorted out since.

9 Q. Was there change in the case law from
10 the time you issued the first report until the
11 time you brought it in to me today?

12 A. None. I made a mistake.

13 Q. When did you realize you made a mistake?

14 A. When I was reading the Manitoba
15 authorities with greater attention on a
16 subsequent date, I went back and looked.

17 Q. So you realized you made a mistake in
18 British Columbia when you were reading the
19 Manitoba cases?

20 A. Yes, because they raised very similar
21 sorts of issues.

22 Q. So, in your mind, you place weight on
23 Manitoba cases for what may happen in British
24 Columbia, but you wouldn't place weight on

1 here. It may be that is indeed a legislative
2 response to the kinds of difficulty to which the
3 Manitoba courts and potentially the British
4 Columbia courts have become embroiled in
5 determining when the starting date is.

6 I thank you for bringing it to my
7 attention, but I really do need to --

8 Q. And that's for ultimate limitations?

9 A. Yes. I really need to read the statute
10 before I can say I agree with you or I don't
11 agree with you. You make, of course, a
12 perfectly valid point.

13 Q. And by process the ultimate limitations
14 concept is different than the normal
15 limitations?

16 A. It has to be for the reasons you
17 described. It has to be.

18 Even though it isn't always obvious on
19 the face of the statute because of the function
20 of an ultimate limitation period, its only
21 intelligible function is curtail or guillotine
22 limitation periods because discoverability would
23 otherwise potentially drag on forever, which is
24 a social evil.

1 starting date for the ultimate limitations
2 period in Manitoba?

3 A. I'm not prepared to dogmatize about it.

4 MR. FAIREY: Object to the form.

5 BY MR. CAMERON:

6 Q. There's one remaining Manitoba claim in
7 this case, that's it. In that claim, the
8 asbestos-containing material was installed in
9 the building in 1956, 36 years prior to the
10 filing of Anderson Memorial and, what is that,
11 42 years prior to the filing of the bankruptcy.

12 A. Yes.

13 Q. Based on those facts, can you give an
14 opinion as to whether or not that claim is
15 barred by the ultimate limitations period?

16 A. By the ultimate limitations?

17 Q. Yes, sir. Not normal, ultimate.

18 A. That would depend upon any residual
19 function retained by the Grace defendants after
20 the installation.

21 I think by the way you set up the
22 question that it seems inherently implausible,
23 but I never like saying things are impossible
24 until I've got a full and credible set of facts.

1 I don't say it is impossible, but, of
2 course, the way you've set up the question makes
3 it inherently unlikely and implausible.

4 Q. Inherently unlikely and implausible
5 what?

6 A. It's inherently unlikely and implausible
7 that the fact situation and the evidence as to
8 what were the acts and omissions of the Grace
9 defendants would have endured so long after the
10 initial installation of the material that they
11 would still support an action which would not be
12 cut short by the ultimate limitation period.

13 I think in those circumstances it is
14 very, very likely that the ultimate limitation
15 period would cut short this action. It is
16 difficult to imagine the limitation period, even
17 if -- we're talking Manitoba here -- even if a
18 discoverability principle were in play which
19 would have required some initiative on the part
20 the plaintiff in the Manitoba court. It is very
21 unlikely there will be anything left to be cut
22 short, very unlikely, by the time the ultimate
23 limitation period comes into play.

24 I think I have perhaps trespassed